Supreme Court, U.S.
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98 388 SEP 2 - 1998
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(1)

No. _____

In the

Supreme Court of the United States

October Term, 1997

RUSSELL H. VOLKEMA and LOIS J. VOLKEMA,
Petitioners,

v.

STATE OF MICHIGAN; DEPARTMENT OF NATURAL RESOURCES, and ROLAND HARMES, Director of Department of Natural Resources,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the government puts a discrete, independently viable 6-acre parcel of land to public use for wetlands preservation, thereby depriving the owners of all economically beneficial use of their property, may the government avoid the constitutional requirement of just compensation merely because the 6-acre segment is included within a larger, 24.6-acre tract?

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Petitioners Russell H. Volkema and Lois J. Volkema respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Michigan Court of Appeals, entered in the above-entitled proceeding on October 20, 1995.

OPINIONS BELOW

The decision of the Court of Appeals of the State of Michigan is reported as *Volkema v. Department of Natural Resources*, 542 N.W. 2d 282 (1995), and is reproduced as Appendix (App.) B. The final judgment of the Michigan Court of Claims is unreported and is reproduced as Appendix C. Page references are to the versions in the appendices.

JURISDICTION

The opinion of the Court of Appeals of the State of Michigan which is the subject of this petition was filed and entered on October 20, 1995. App. B. The order of the Michigan Supreme Court denying Petitioners' application for leave to appeal was entered on June 9, 1998. App. A. The Michigan Court of Appeals considered and decided the question of whether the state's denial of all economically beneficial use of an approximately six-acre segment of Petitioners' land comprised an uncompensated regulatory taking of Petitioners' property in violation of the Fifth Amendment to the United States Constitution. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part, "private property [shall not] be taken for public use, without just compensation."

STATEMENT OF THE CASE

Russell and Lois Volkema (Volkemas) own 24.6 acres of commercial property in Kentwood, Michigan.[1] This land was originally part of a larger parcel the Volkemas had been progressively developing since they acquired the property in 1963.[2] The Volkemas made extensive investments in infrastructure over the years, and the property has an assessed value in excess of $20,000 per acre.[3] The property is zoned commercial and is situated in a prime commercial development area.[4]

Seventeen years after the Volkemas acquired and began developing their property, the State of Michigan adopted the Wetland Protection Act.[5] Under authority of this Act, the Michigan Department of Natural Resources classified 4.3 acres of the Volkemas' property as wetlands.[6]

In 1991, the Volkemas proceeded with plans to complete development of their 24.6 acres as a water park, in conjunction with such a park already operating on a contiguous 10-acre parcel. This final stage of development would require filling the 4.3 acres of wetlands. When the Volkemas applied to the Michigan Department of Natural Resources (MDNR) for the necessary permits, however, their applications were denied.[7]

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[1] App. B-1.

[2] *Id.*

[3] App. F-1-2.

[4] App. D-1.

[5] App. B-2.

[6] *Id.*

[7] App. F-2.

The effect of MDNR's denial was to require the 4.3 acres to be used exclusively for wetlands preservation. The denial deprived the Volkemas of all economically beneficial use of the irregularly shaped 4.3-acre parcel. In order to square off the boundaries of the preservation area, a surrounding 1.4 acres of the Volkemas' land was also rendered useless to them.[8]

In response to this loss of all productive use of approximately six acres of commercial property, the Volkemas sued MDNR in the Michigan Court of Claims for a regulatory taking of their property. Relying on this Court's holding in *Lucas v. South Carolina Coastal Council*,[9] the Volkemas argued that the uncompensated denial of all economically viable use of a discrete, well-defined six-acre segment of their property comprised a categorical violation of the Takings Clause.[10] The federal question now being brought to this Court was first raised in Petitioners' complaint,[11] and was forcefully urged at each step of the proceedings in the trial court and court of appeals.[12]

Just as the trial court in *Lucas* found the property in that case to be rendered "valueless" by the Beachfront Management Act,[13] the trial court below found that MDNR's wetlands classification and permit denial left the affected segment of the

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[8] App. D-1.

[9] 505 U.S. 1003 (1992).

[10] App. D-2-3.

[11] Complaint, Court of Claims Case No. 91-13914-CM, dated October 29, 1991, at 4.

[12] Brief of Plaintiffs/Appellants, Michigan Court of Appeals No. 1598230, dated February 19, 1993, at 2.

[13] 505 U.S. at 1007.

Volkemas' land "unusable."[14] However, the trial court held that the relevant parcel for purposes of Fifth Amendment takings analysis was not the 4.3 acres the state required to be utilized as a wetlands preserve, nor the 6 acres that MDNR's permit denial had rendered unusable to the Volkemas, but the Volkemas' entire 24.6-acre holding. The court analogized the denial of all beneficial use of a discrete segment of the Volkemas' property to ordinary zoning setback requirements "that limit or prohibit the ability of an owner to develop part of their property."[15] Because the state "only" required one-fourth of the Volkemas' total holdings to be used exclusively for wetlands preservation, the court found no taking had occurred.[16]

The Michigan Court of Appeals affirmed. Citing to *Lucas*, the appellate panel acknowledged that because of MDNR's actions the Volkemas had been "deprived of all the economically beneficial use of their land."[17] Nevertheless, the court below found no taking had occurred. Referring to this Court's opinion in *Penn Central Transportation Corp. v. City of New York*,[18] the court of appeals affirmed that the relevant parcel for determining takings liability consisted of the Volkemas' entire 24.6 acre holding:

> We conclude it would be contrary to the holding in *Penn Central* to extract portions of a property and

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[14] App. D-1.

[15] App. D-3.

[16] *Id.*

[17] App. B-4.

[18] 438 U.S. 104, 130 (1978).

> examine those portions piecemeal when determining the effect of a land-use regulation on the property.[19]

In dissent, Judge Sawyer pointed out a key distinction between cases such as this one, in which regulations carve out a discrete segment of land and press it into public use, and those in which regulatory restrictions merely diminish the value of some overall larger tract.

> The effect of the Wetland Protection Act . . . and of defendant's denial of a fill permit is to preclude utterly the use of a portion of plaintiffs' property. Plaintiffs are not free to choose what portion of their property to develop. Rather, the regulation allows development of a specific portion of the property and absolutely precludes the development of another portion of the property.[20]

Under these circumstances, where the state's regulations have themselves divided real property into independent, discrete segments and pressed one of the newly defined parcels into public service, a taking should be found "with respect to the identifiable portion which cannot be used."[21]

For purposes of applying *Lucas*' categorical takings rule, the dissent below recognized that it is not constitutionally relevant whether the land owner possesses other holdings in addition to what the state has converted to public use by operation of its regulations.

> What is relevant is that the government has determined that a public purpose would be served by denying the rightful owner of the property the use of

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[19] App. B-8 n.7.

[20] App. B-12 (Sawyer, J., dissenting) (citation omitted).

[21] App. B-13 (Sawyer, J., dissenting).

> that property and requiring it to be used, or in this case not used, in accordance with that public purpose. While the government is permitted to do this, it must compensate the property owner for putting the property to public use. Our historical protection of private property in the constitution allows no less.[22]

The Michigan Supreme Court held the Volkemas' application for leave to appeal in abeyance for 14 months, finally denying it on June 9, 1998.[23] The Volkemas now file this petition for writ of certiorari, hoping that this Court will take up the important constitutional issue it left open in *Lucas* and decide whether a categorical violation of the Takings Clause occurs where a discrete, well-defined segment of real property is carved out and devoted exclusively to public use by operation of environmental or other land use regulations.

REASONS FOR GRANTING THE PETITION

I

THIS CASE INVOLVES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW LEFT OPEN BY *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL* THAT MUST BE RESOLVED BY THIS COURT

In *Lucas v. South Carolina Coastal Council*, this Court declared that land use restrictions that deprive owners of all economically beneficial use of their property trigger the requirement for just compensation under the Takings Clause of the Fifth Amendment.[24] The *Lucas* opinion candidly admitted, however, that

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[22] *Id.*

[23] App. A.

[24] *Lucas*, 505 U.S. 1003.

> the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.[25]

The uncertainty surrounding this issue has imposed heavy costs on property owners, as illustrated by the case at bar. Petitioners respectfully submit that the time has come for this Court to revisit the issue of partial categorical takings left open in *Lucas*. In particular, Petitioners urge this Court to clarify that *Lucas*' categorical takings rule comes into play whenever a discrete, independently viable segment of real property is carved out of a larger parcel and put to exclusively public use by operation of state land use controls.

The so-called "denominator problem," the task of determining the relevant parcel for Fifth Amendment takings claims, is "[o]ne of the most troubling areas in current takings jurisprudence."[26] The doctrinal importance of this issue has been well summarized by Professor Epstein:

> The protection afforded by the eminent domain clause to each part of an endowment of private property is equal to the protection it affords the whole—no more and no less. No matter how the

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[25] *Lucas*, 505 U.S. at 1016 n.7.

[26] Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L. J. 663, 725 (1996).

> basic entitlements contained within the bundle of ownership rights are divided and no matter how many times the division takes place, all of the pieces together, and each of them individually, fall within the scope of the eminent domain clause.[27]

In *Lucas*, this Court found the deprivation of all economically viable use of David Lucas' two beachfront lots gave rise to a categorical taking (barring a showing that the owner's proposed property use was foreclosed by state common law principles).[28] Compensation was required because the enactment of South Carolina's Beachfront Management Act had displaced the entirety of Mr. Lucas' rights of dominion and control over the use of his property. But the state would have taken no less if Mr. Lucas had happened to own a third lot, on which he could build. If Mr. Lucas had all along owned a third parcel on the Isle of Palms, located inland of the "no-build" line established by the Beachfront Management Act, would this have altered the outcome of his case? There is no reason to believe that fact would have been relevant to the takings analysis. As Professor Epstein notes,

> Prima facie, compensation must be paid for the land taken no matter how much land the owner retains. . . . In the case [where the state takes two acres of land from a four-acre parcel], what is decisive is that which is taken, not that which is retained. It matters not if the claimant owns only the two acres taken or the full four acres; the obligation to compensate is constant in either case.[29]

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[27] Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 57 (1985).

[28] 505 U.S. at 1029-31.

[29] Epstein, *Takings* at 57-58.

There are doctrinally important reasons for this Court to clarify that *Lucas'* categorical rule applies to the taking of discrete, independently viable parcels of real property, even when these parcels comprise less than the totality of an owner's property holdings. Such a rule is especially compelling in cases like the one at bar, where the government has imposed its own preferred use of the property in place of the owners' reasonable investment-backed expectations. The state and federal courts are in conflict on this important question of Fifth Amendment interpretation, adding to the urgency of the need for this Court to resolve this issue.

A. When the Government Deprives an Owner of All Beneficial Use of a Discrete, Independently Viable Segment of Real Property, *Lucas' Per Se* Takings Rule Should Be Triggered

There are compelling reasons for this Court to apply *Lucas'* categorical takings rule to the regulatory deprivation of all beneficial use of a discrete, independently viable segment of real property. Deprivations such as those imposed by MDNR in the case at bar entail the assertion of *complete dominion and control* over real property by the state, for which compensation has traditionally been required. The segment of property that has been rendered unusable had *independent economic viability* prior to application of the regulations at issue. The Volkemas had formed concrete, reasonable, *investment-backed expectations* regarding their use of the property, which were completely extinguished by MDNR's actions. There was *no essential nexus* between the state's determination that the 6-acre segment must be used exclusively for wetlands preservation and any burdens arising from the Volkemas' proposed use of their 24.6 acre tract. Finally, the deprivation of all use of a discrete, independently viable segment is qualitatively different from a mere reduction in value of the larger tract and should not be analyzed under the same rule of takings liability.

1. When the State Asserts and Exercises Complete Dominion over a Discrete, Well-Defined Segment of Land, *Lucas*' Categorical Takings Rule Should Be Triggered

Our takings jurisprudence rests in large measure on the recognition that private property rights are inextricably linked with individual liberty and autonomy.[30] As this Court has recognized, property owners suffer a unique injury—regardless of the scale of the government's intrusion—when they are required by state action to "permit another to exercise complete dominion" over a portion of their land.[31] It is this complete loss of dominion that is the gravamen of a categorical taking, regardless of whether the whole or only a part of the landowner's holdings are taken.

In the present case, the State of Michigan has wholly eradicated the Volkemas' autonomous decision-making authority over six acres of their land, and supplanted it with its own. MDNR's actions in classifying the Volkemas' property as wetlands and then denying the permits required to make any beneficial use of the land cut through the Volkemas' entire bundle of ownership rights with respect to that segment. The land can now be used *only* for the purpose the state has dictated—for wetlands preservation.[32] It is the state's exercise of complete dominion

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[30] *See, e.g.*, Roger Pilon, *Property Rights, Takings, and a Free Society*, in *Public Choice and Constitutional Economics* 151, 176 (J. Gwartney & R. Wagner eds, 1988) ("property rights are at the very heart of a free society, serving to define the normative relationships among its members and to enable those individuals to pursue their various ends free from the interference of others").

[31] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

[32] *See* App. B-4; App. D-2.

and control over this six-acre segment that triggers the requirement for just compensation under *Lucas*.

There is a qualitative difference between government regulation that imposes some restriction on property use by "adjusting the benefits and burdens of economic life"[33] and the unilateral exercise of total government control over a productive parcel of private land. There simply is no greater governmental intrusion into the realm of personal liberty and autonomy than when the state confiscates all meaningful decision-making authority in private land for the general public good.

2. A Categorical Taking Should Be Found When Regulations Destroy All Beneficial Use of What Was Previously an Independently Viable Segment of Real Property

One useful test of whether a taking has occurred is to examine whether the segment of land pressed into public service could, prior to the application of the regulations in question, "have been put to at least one economically viable use, independent of the surrounding land segments."[34] This inquiry looks to the uses to which the owner could have put the property in the absence of the regulations to determine whether these uses would have been economically viable in their own right. This avoids bringing ordinary zoning setbacks and buffer zones under the rubric of categorical takings:

> The most obvious example . . . is the property between the edge of a building and the street. In most situations, this buffer zone would be of no economic use to anyone except the owner of the building, and the owner of the building typically would have no economic use for it other than to plant

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[33] *Penn Central*, 438 U.S. at 124.

[34] John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1534, 1557 (1994).

> grass, expand the existing enterprise, or otherwise add value to a larger segment of land. In such a case, it would be inappropriate to consider the buffer zone an independent parcel for regulatory taking purposes, for it has no economic use in and of itself.[35]

The trial court below mistakenly held that MDNR's taking of the Volkemas' six acres was not different in kind from imposing zoning setbacks or buffer zones.[36] The court missed the crucial distinction that such residual strips of land are not ordinarily economically viable in their own right, and thus could not fall within *Lucas*' categorical takings rule.

Instead, the court should have examined the six acres of wetlands "to see if it could have been put to at least one economically viable use independent of the surrounding land prior to the regulation."[37] The record in this case indicates that the segment in question consists of six acres of prime commercial land in a rapidly developing area.[38] This land had an assessed value of some $120,000 in its natural condition,[39] and a 1991 market value in excess of $212,000 if properly graded and filled.[40] Because this six-acre segment would obviously have independent economic viability but for the application of MDNR's regulations and permit denial, it should be subject to *Lucas*' categorical takings rule regardless of the remainder of the Volkemas' holdings.

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[35] John E. Fee, Comment, at 1559.

[36] App. D-3.

[37] John E. Fee, Comment, at 1557.

[38] App. D-1.

[39] App. F-2.

[40] Stipulation of the parties, Michigan Court of Claims No. 91-13914-CM.

3. A Consistent Application of the Takings Clause Should Not Countenance the Complete Extinguishment of an Owner's Reasonable Investment-Backed Expectations Merely Because Other Property Segments Are Also Owned

Applying *Lucas* to the type of taking at issue here would be consistent with the well-recognized importance of protecting reasonable, investment-backed expectations.[41]

> After *Lucas* . . . the Supreme Court may take the position that the "economically viable use" test should be applied to smaller portions of the owner's property. The *Lucas* Court dismissed *Penn Central's* consideration of the owner's other holdings in the area as "unsupportable." It suggested instead that the appropriate unit should be determined by the owner's expectations.[42]

The court below expressly found that the Volkemas "had an investment-backed expectation in the property in question."[43] The Volkemas had invested heavily over the years in constructing and installing roadways, parking facilities, utilities, sewers, and a retention pond for the benefit of the six-acre segment as

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[41] *See, e.g., Penn Central*, 438 U. S. at 124 ("the extent to which the regulation has interfered with distinct investment-backed expectations" an important consideration in determining takings liability); *Lucas*, 505 U. S. at 1034 ("[w]here a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations").

[42] Ann T. Kadlecek, Note, *The Effect of Lucas v. South Carolina Coastal Council on the Law of Regulatory Takings*, 68 Wash. L. Rev. 415, 433 (1993) (footnote omitted).

[43] App. B-4 n.3.

well as the rest of their holdings.[44] The Volkemas' expectations regarding the 6-acre segment were indistinguishable from their expectations of developing the larger 24.6-acre parcel. When MDNR carved out the six acres for dedication to a public use, the Volkemas' admittedly reasonable expectations with respect to that independently viable segment were utterly extinguished. This should be grounds for applying *Lucas'* categorical takings analysis to the loss of all beneficial use of a discrete segment of real property.

4. The Rationale for Finding a Compensable Partial Taking Is Strengthened Where, as Here, There Is No Nexus Between the Regulatory Burden Placed on the Segment Taken and the Owner's Use of the Remainder of the Tract

The trial court below likened MDNR's permit denial to the imposition of "set backs from property lines and other requirements that limit or prohibit the ability of an owner to develop part of their property. These do not constitute a taking since it is recognized that such rules are for the good of all."[45] The kernel of truth in the court's reasoning is that such restrictions do not constitute a taking because they are inextricably connected to the owner's proposed use of the remainder of the property. In this Court's takings parlance, setbacks and comparable limitations bear an *essential nexus*[46] to the placement of buildings and other development activity occurring on the surrounding property. Similarly, certain restrictions on the use of part of a property may be necessitated by health and

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[44] App. F-1-2.

[45] App. D-3.

[46] *See Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987).

safety concerns arising from the owner's use of the balance of the estate.[47]

No such nexus exists in the present case. Nothing in the Volkemas' proposed use of their 24 acres of land as a water park would create a burden that could be mitigated by devoting 6 acres to wetlands preservation. The two uses of the Volkemas' property are wholly unrelated. Because of this absence of nexus, the trial court's analogy to zoning setbacks fails. The state's determination that the Volkemas must devote their property to wetlands preservation is wholly gratuitous, motivated solely by the state's desire to press private resources into public use without the inconvenience of paying for them.

5. The Complete Usurpation of an Owner's Rights to the Use of a Discrete Segment of Real Property Is Qualitatively Different from a Mere Reduction in the Value of a Larger Parcel of Which it Is a Part, and Should Not Be Analyzed Under the Same Rule of Takings Liability

In *Lucas*, this Court referred to regulations that would not be classified as takings because they resulted in a "mere diminution in value" of private land.[48] Typically, these cases involve regulatory restrictions that reduce the utility of the owner's entire holdings. Classic examples include *Village of Euclid v. Ambler Realty Co.*[49] (approximately 75% diminution in value due to

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[47] *See Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497-502 (1987) (law requiring some coal to be left in pillars upheld in part on grounds that this restriction was necessary to prevent subsidence that would otherwise be caused by owners' extraction of remainder of coal).

[48] 505 U.S. at 1016 n.7.

[49] 272 U.S. 365, 384 (1926).

imposition of zoning ordinance); and *Hadacheck v. Sebastian*[50] (92.5% diminution in value due to ordinance limiting operation of brickyard to certain areas).

The court below characterized the State of Michigan's elimination of all beneficial use of the Volkemas' property as comprising just such a diminution in value, for which compensation is not required.[51] However, this case does not fit within this Court's regulatory diminution decisions. In none of these cases did the government attempt to carve out a discrete portion of the owner's property and require it to be devoted to some public use. The closest analogy would be the decision described as "extreme and unsupportable" in *Lucas*—*Penn Central Transportation Co. v. City of New York*.[52] Yet *Penn Central* did not involve the complete deprivation of beneficial use of *any portion* of the subject property. The owners alleged a taking of the air space over Grand Central Terminal,[53] but the record established that they had not in fact been denied all use of this or any other segment of their property holdings.[54]

Regulations that cause a general decrease in the value of an owner's total holdings are properly subject to the multifacted balancing test of *Penn Central*.[55] Land-use restrictions of this kind are qualitatively different from the complete deprivation of beneficial use of a discrete, independently viable segment of real property. Deprivations of the latter kind, as Judge Sawyer

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[50] 239 U.S. 394, 405 (1915).

[51] App. B-9.

[52] 438 U.S. 104.

[53] *Id.* at 130.

[54] *Id.* at 137.

[55] *Id.* at 123.

pointed out in the dissent below,[56] should be viewed as categorical takings under *Lucas*.

B. When the Government Requires that a Discrete Segment of Private Property Must Be Used for a Public Purpose, Compensation Should Be Required Under *Lucas*

This Court has always exercised special vigilance to ensure compliance with the Takings Clause when the state puts any segment of private property to public use through regulatory enactments or other actions.[57] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[58] this Court found a New York statute to effect a taking because it required an apartment owner to allow a cable television company to place cable equipment on the roof of her building.[59] Although usually classified as a "physical invasion" case, *Loretto* is perhaps better characterized as one in which the state dictated the specific *use* to which a part of Mrs. Loretto's property would have to be devoted. Because the government required the property owner to devote a segment of her property to providing a cable television installation, a compensable taking was found even though this use was imposed on no more than 1.5 cubic feet of space directly above and on the roof of the building.[60]

In the present case, the State of Michigan has imposed an exclusive public use on 6 acres of the Volkemas' property, as opposed to the 1.5 cubic feet in *Loretto*. The courts below

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[56] App. B-9-14 (Sawyer, J., dissenting).

[57] *See, e.g.*, Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1111-30 (1993).

[58] 458 U.S. 419.

[59] *Id.* at 435-40.

[60] *See id.* at 438 n.16.

treated MDNR's actions as a mere restriction on the Volkemas' use of their land, rather than the dedication of this six acres to an exclusively public use.[61] However, it is little more than semantic game playing to argue that the state has not put the Volkemas' property to use for wetlands preservation. As one commentator has noted,

> [w]etlands laws prohibiting all development not only prevent harm, but also take over property in order to exploit some of its use-values for state-dictated service.[62]

Indeed, wetlands preservation is a well-recognized governmental use of property. Land is commonly acquired by government through eminent domain or comparable proceedings and put to precisely the same use that the state has imposed on the Volkemas' property. The only difference is that in this case, the State of Michigan chose not to pay for what it took.[63]

Employing the Volkemas' property for use in wetlands preservation advances policy objectives of the State of Michigan that can be (and are) equally well advanced by purchasing

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[61] App. B-9; App. D-3.

[62] Jed Rubenfeld, *Usings*, 102 Yale L. J. at 1157.

[63] The conservation of natural resources is identified as a "paramount public concern" under the Michigan Constitution, art. 4, § 52. MDNR aggressively pursues this objective through such policies as acquiring private wetlands through reversion to the state for non-payment of taxes. *See* St. Clair Flats Management Plan (April, 1981). The Wetland Protection Act itself provides for the public acquisition of wetlands from private owners—but only if those owners first go to court and obtain a judgment against the state. MICH. COMP. LAWS ANN. Chap. 324 § 30323.

similar parcels of land throughout the state. The government cannot reasonably protest that it only "uses" land for wetlands preservation when it acquires title, whereas imposing this same use on private land without compensation is really a "non-use."

This case is not comparable to *Keystone*, where the government gained no utility from requiring mine owners to forgo the extraction of certain columns of coal. There, the columns were required to alleviate legitimate public health and safety concerns related to the owners' use of the remainder of the property. Here, in contrast, the use of land for wetlands preservation is an independent policy objective of the State of Michigan, unrelated to the Volkemas' use of their property. This policy objective can be pursued either by acquiring land for state management and control, or by imposing state control to direct the use of privately owned land, as has occurred here. In either case, employing land exclusively for wetlands preservation is clearly a public use of that property within the meaning of the Takings Clause.

It should be noted that the Volkemas have no cause to dispute that wetlands preservation is a legitimate, or even laudable, governmental objective. That issue is not before the Court. As Justice Holmes reminds us,

> [t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . .
>
> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[64]

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[64] *Pennsylvania Coal Co. v. Mahon Co.*, 260 U.S. 393, 415-16 (1922).

II

THE DECISION BELOW CONFLICTS WITH OPINIONS OF THE OREGON SUPREME COURT AND THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND FEDERAL CIRCUITS IN THEIR TREATMENT OF TAKINGS CLAIMS BROUGHT UNDER THE FIFTH AMENDMENT

The importance of the constitutional question raised by this case is underscored by the existence of deep conflicts on this issue between the states and among the federal circuit courts of appeals. Although the Volkemas' Fifth Amendment takings claim was denied by the Michigan courts, it would have been upheld by the Oregon Supreme Court under that state's interpretation of the federal Constitution. Similarly, if the defendant had been the United States instead of the State of Michigan, the Volkemas would have prevailed in the Federal Circuit Court of Appeals. Other states and circuits are hopelessly divided in their treatment of federal takings claims based on the taking of discrete, well-identified segments comprising less than the entirety of a landowner's holdings. The rights guaranteed to citizens under our Constitution should not depend on the particular state or federal jurisdiction in which they are asserted. This Court should grant the petition to establish uniformity in the treatment of partial takings claims brought under the Fifth Amendment.

A. The Oregon Supreme Court Has Found a Taking Where Environmental Regulations Required that a Discrete Segment of a Larger Tract Be Used for Endangered Species Habitat

In a case strikingly similar on its facts to the one at bar, the Oregon Supreme Court arrived at precisely the opposite conclusion from the court below on the proper application of federal constitutional law. In *Boise Cascade Corporation v.*

Board of Forestry,[65] the state Board of Forestry denied an application to harvest timber on a 64-acre tract to protect an endangered species (the northern spotted owl) that had established its habitat on the plaintiff's property. The board specified an 8-acre segment that could be harvested subject to certain conditions, thereby carving out a 56-acre segment that was deprived of all economically viable use and forced into service as species habitat.[66] The property owner sued, alleging a Fifth Amendment taking of the 56-acre segment.

The Oregon Supreme Court found that the plaintiff had stated a claim for a taking by alleging "depriv[ation] . . . of the only economically viable use of approximately 56 acres of merchantable timber."[67] The court emphasized that it considered the regulated 56 acres to be the relevant parcel for its takings analysis by *denying* a concurrent claim for a temporary taking of the remainder of the 64-acre tract![68]

By focusing its takings analysis on the discrete 56-acre tract that the State of Oregon required to be used as owl habitat, the Oregon Supreme Court (correctly) applied the Takings Clause in a manner completely contrary to the doctrine of the Michigan court below. It is antithetical to our constitutional form of government that rights secured under the Fifth Amendment should be protected in some states but not in others. This petition should be granted so that this Court can establish a uniform interpretation of the Takings Clause for categorical takings of discrete segments of larger tracts of land.

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[65] 935 P.2d 411 (Or. 1997).

[66] *Id.* at 415.

[67] *Id.* at 420 (citing complaint).

[68] *Id.* at 420-21.

B. The Opinion Below Conflicts with the Federal Circuit's Decision in *Loveladies Harbor*

In *Loveladies Harbor, Inc. v. United States*,[69] landowners brought a claim for the regulatory taking of a 12.5-acre segment of a 51-acre parcel. Originally, the 51 acres had been part of a 250-acre tract, most of which had already been developed and sold.[70] When the Army Corps of Engineers denied Loveladies a federal permit needed to develop the 12.5 acres, instead requiring the land to be used for wetlands preservation, Loveladies brought suit against the federal government for just compensation under the Takings Clause.

The Federal Circuit Court of Appeals was directly confronted with the "denominator" issue. The government contended that the relevant property for a takings analysis was either Loveladies' original 250-acre parcel or the 51 acres which it still owned when the permit was denied.[71] Loveladies argued that the denominator of the takings fraction was the 12.5 acres for which it had sought a permit.[72]

The court of appeals agreed with Loveladies, declining to include the impact of the permit denial on the remaining 38.5 acres. The court concluded that "the relevant property for the takings analysis is the 12.5 acres, for which the trial court found the remaining value to be de minimis."[73] Consequently, the court of appeals held Loveladies had been deprived of all economically beneficial use of the "relevant parcel." Thus the

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[69] 28 F.3d 1171 (Fed. Cir. 1994)

[70] *Id.* at 1180.

[71] *Id.*

[72] *Id.* at 1181.

[73] *Id.*

permit denial was "effectively a total taking of the property owners' interest *in these [12.5] acres.*"[74]

The Federal Circuit's focus in *Loveladies* on the property actually carved out for dedication to a public use by the operation of land use regulations, rather than on the owners' entire holdings, stands in stark contrast to the approach of the Michigan courts in the present case. If the plaintiffs in *Loveladies Harbor* had brought their takings claim against MDNR in the Michigan courts, instead of against the Corps of Engineers in the Court of Federal Claims, it is safe to conclude they would have suffered the same fate as the Volkemas.[75]

C. The Decision Below Conflicts with the Ninth Circuit's Decision in *American Savings*

In *American Savings and Loan Association v. County of Marin*,[76] Marin County applied two different zoning classifications to two contiguous segments of a landowner's property. One 48-acre section called Strawberry Spit was zoned as urban open space with a 5-acre minimum lot size. An adjacent 20-acre section known as Strawberry Point was zoned to allow 4 multi-residential units per acre.[77] The point was worth some

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[74] *Id.* at 1182 (emphasis added).

[75] The court below purported to distinguish *Loveladies* on the basis that the property owners had executed deed restriction to the State of New Jersey on the 38.5-acre segment. App B-5. However, this misses the point that the Federal Circuit evaluated Loveladies' takings claim by examining the impact of the government's action on the 12.5-acre segment it had carved out for wetlands preservation, rather than evaluating the 51-acre parcel as an organic whole.

[76] 653 F.2d 364 (9th Cir. 1981).

[77] *Id.* at 367.

$2 million under this zoning arrangement.[78] Nevertheless the owner sued, alleging a regulatory taking of the spit because of the severe zoning restrictions on the 48-acre segment. The trial court held that, since the spit and point were contiguous sections of land under common ownership, the entire 68 acres comprised the relevant parcel for purposes of determining takings liability.[79]

On appeal, the Ninth Circuit recognized that the issue before it was "whether the challenged ordinance creates two separate parcels for taking purposes by adopting different zoning designations for each parcel."[80] The court rejected as inapplicable cases where property was treated as a single unit for takings purposes because in those cases "the entire subject property was covered by a uniform restriction."[81] Instead, the Ninth Circuit noted that this Court in *Nectow v. Cambridge*[82] applied separate constitutional analysis to two contiguous segments of property under common ownership that had been subjected to different zoning.[83]

The Ninth Circuit also agreed with the Oregon Supreme Court's analysis in *Fifth Avenue Corp. v. Washington County*[84] wherein that court "divided the property analytically into two

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[78] *Id.* at 368.

[79] *Id.* at 367.

[80] *Id.* at 370.

[81] *Id.* at 369.

[82] 277 U.S. 183 (1928).

[83] 653 F. 2d at 370.

[84] 581 P.2d 50 (Or. 1978).

parcels" depending on whether they were zoned as developable or not.[85]

Most significantly, the *American Savings* court concluded by holding that if ***the appellant can show that "the Spit and Point have been, or would be, treated separately when its development plans are submitted . . . [then] the spit must be analyzed as a separate parcel for takings purposes."***[86]

This holding clearly conflicts with the treatment of the Volkemas' takings claim by the court below. The Michigan court refused to consider the 6-acre parcel, which had been dedicated for use exclusively as a wetlands preserve, separately from the contiguous 18 acres on which development could occur.[87] Moreover, the court below did not find it significant that the Volkemas had prepared a development plan embodying their investment-backed expectations for their entire 24.6 acres, and the government responded by treating the two segments of property as different entities with respect to their development potential.[88]

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[85] 653 F.2d at 370.

[86] *Id.* at 372 (emphasis added). *Accord, Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990). In deciding to treat different segments of a single legal property as separate parcels for purposes of its takings analysis, the court cited as the "most important" consideration the fact that "the City has treated Queen's Beach separately for zoning and planning purposes. . . . In summary, under the facts of this case, Queen's Beach is to be considered a separate parcel for the purposes of determining whether there has been a taking." 649 F. Supp. at 947-48.

[87] App. B-7.

[88] *Id.*

It places an unacceptable strain on our constitutional form of government when rights guaranteed under the Fifth Amendment are recognized and protected in some state and federal jurisdictions but not in others. This Court should grant the petition for certiorari to establish that Michigan citizens are entitled to the same rights under the Takings Clause as property owners who bring suit in the courts of the Ninth Circuit, or the Federal Circuit, or the State of Oregon.

CONCLUSION

In *Lucas*, this Court established that a governmental deprivation of all beneficial use of private land categorically triggers the requirement of just compensation under the Takings Clause.[89] In *Loretto* and other decisions, this Court has also applied a categorical takings rule to situations where the government actually puts any discrete segment of private land to public use, even if the affected property is only a small part of the owner's holdings.[90] This case stands at the intersection of these two categorical rules. The State of Michigan has carved out a discrete, well-defined segment of the Volkemas' land and required it to be put to public use as a wetlands preserve. In so doing, the state has also deprived the Volkemas of all beneficial use of this land, which previously had independent economic viability. However, instead of triggering categorical takings liability under either *Lucas* or *Loretto*, the court below found that the state incurred no liability to compensate the Volkemas for the six-acre parcel it had taken.[91]

Other state and federal courts interpret the Fifth Amendment differently on this question. The Volkemas would have prevailed if their claim had been brought in Oregon under

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[89] *Lucas*, 505 U.S. at 1019.

[90] *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 426.

[91] App. B-9.

Boise Cascade,[92] or in the Federal Circuit under *Loveladies Harbor*,[93] or in the Ninth Circuit under *American Savings*.[94]

This Court should grant this petition so that it can address the issue of categorical regulatory takings of less than the entirety of a landowner's holdings, an issue the Court raised but left open in *Lucas*. The facts of this case provide an opportunity for this Court to provide much needed guidance to the lower federal and state courts and to establish a uniform base of constitutional protection under the Fifth Amendment. The Volkemas urge this Court to adopt the rule set forth by Judge Sawyer in the dissent below:

> [A] taking occurs where a regulation precludes the use of an identifiable, discrete piece of property, even if that property forms only a portion of a larger parcel.[95]

For these reasons, Petitioners Russell and Lois Volkema respectfully request that this Court grant the petition for writ of certiorari.

DATED: September, 1998.

Respectfully submitted,

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[92] 935 P.2d 411.

[93] 28 F. 3d 1171.

[94] 653 F.2d 364.

[95] App. B-13 (Sawyer, J., dissenting).

Filed 6/9/98
Michigan Supreme Court
Lansing, Michigan

ORDER
Entered: June 9, 1998

RUSSELL H. VOLKEMA and
LOIS J. VOLKEMA, husband
and wife,

Plaintiffs-Appellants/
Cross-Appellees,

v

SC: 104723
COA: 159820
LC: 91-13914

MICHIGAN DEPARTMENT OF
NATURAL RESOURCES,

Defendant-Appellee/
Cross-Appellant.

By order of April 29, 1997, the application for leave to appeal was held in abeyance pending the decision in *K&K Construction, Inc. v. Michigan Dep't of Natural Resources*, (Docket No. 106712).

On order of the Court, the decision having been issued on March 24, 1998, 456 Mich 570 (1998), the application is again considered. The motions to file briefs *amici curiae* are considered and they are GRANTED. The application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. The result reached by the Court of Appeals is correct pursuant to this Court's decision in *K&K Construction, Inc., supra*. The Court of Appeals' analysis, particularly its reliance on *Loveladies Harbor, Inc. v. United States*, 28 F 3d 1171 (1994), is disavowed insofar as it is inconsistent with this Court's decision in *K&K Construction*.

The application for leave to appeal as cross-appellant is DENIED as moot.

Appendix A-2

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 9, 1998 /s/ Jacqueline B. McKinna
Deputy Clerk

Appendix B-1

Filed 10/20/95

STATE OF MICHIGAN
COURT OF APPEALS

Russell H. VOLKEMA and
Lois J. Volkema, husband
and wife,

Plaintiffs-Appellants/
Cross-Appellees,

v.

DEPARTMENT OF NATURAL
RESOURCES,

Defendant-Appellee/
Cross-Appellant,

and

Michigan Association of Realtors,

Amicus Curiae.

No. 159820.
LC No. 91-013914-CM

Before NEFF, P.J., and SAWYER and MARKEY, JJ.

NEFF, P.J.

Plaintiffs appeal, and defendant cross appeals, from an order of the circuit court denying plaintiffs relief with respect to their inverse condemnation claim. We affirm.

I

Plaintiffs purchased approximately forty-five acres of commercial property in Kentwood in 1963 and an additional contiguous five-acre parcel in 1979. Plaintiffs made various improvements to the property, sold parcels of the property, and leased a ten-acre parcel to a water park operator. After the sales and lease, 24.6 acres remained, which are the subject of the

present litigation. Plaintiffs sought to have the water park developed on the remaining 24.6 acres in conjunction with the leased ten acres. The water park has a plan that eventually calls for the purchase of the property. However, the 24.6-acre parcel includes some lowlands, which have been classified as protected wetlands under the Wetland Protection Act, M.C.L. § 281.701 *et seq.*; M.S.A. § 18.595(51) *et seq.*, which was enacted in 1980. Defendant denied plaintiffs' request for a permit to fill 4.3 acres of wetlands. Plaintiffs now seek compensation for the six acres they claim are rendered useless by the denial of the fill permit.

The trial court determined that the relevant parcel to consider in determining whether there was a taking is the remaining 24.6-acre parcel. The trial court determined that because only approximately one-quarter of the property was affected, there was no taking.

II

On appeal, the parties present a number of arguments, all of which essentially raise the same issue, namely, whether there was a taking. Because we conclude there was none, we affirm the trial court's decision.

A

1

It is now well-established under constitutional doctrine that a taking of property requiring just compensation may occur if a landowner's property is either physically invaded or regulated "too far." See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Although the Supreme Court has declined to definitively state what "too far" is, two circumstances exist in which compensation is afforded the property owner without a case specific inquiry. *Id.* at 1015, 112 S.Ct. at 2893.

The first category in which compensation is automatically awarded is when the government physically invades a landowner's property. *Id.* This case, however, does not present such a circumstance, and thus any case law or arguments of the parties based on a physical invasion of property are irrelevant to this appeal.

The second distinct category in which compensation is automatically awarded is where a regulation denies all economically beneficial or productive use of one's land. *Id.* In other words, the Fifth Amendment right to just compensation is violated when a land-use regulation either (1) does not substantially advance a legitimate state interest, or (2) denies a landowner all economically viable use of his land in contravention of the property owner's investment-backed expectations.[1] *Id.* at 1016, 112 S.Ct. at 2894.

This is not to suggest that compensation is always awarded. When a land-use regulation merely results in diminution in a property's value, the property owner is not entitled to compensation. *Id.* at 1016, 112 S.Ct. at 2894. The justification for this rule is often stated as being that:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . [*Id.*]

2

After a review of the parties' appeal and cross appeal, it is apparent that neither party here is arguing that the land-use regulation at issue does not substantially advance a legitimate state interest. Accordingly, we express no opinion with regard

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[1] An exception to this rule exists: a state government may always regulate land pursuant to its common law regarding nuisances. *Id.*

to that matter and assume, for the purposes of this appeal, that the regulation does advance a legitimate state interest.[2]

Thus, the only question that must be answered here is whether plaintiffs were denied all economically viable use of their land. The answer to this question depends on what parcel of land is used to compare plaintiffs' before and after property values.[3] In other words, if we focus only on the six acres that plaintiffs claim were rendered economically useless by the Wetland Protection Act, then plaintiffs have established that they were deprived of all the economically beneficial use of their land. If, however, we use some larger parcel, say the 24.6-acres that encompasses the six acres, or the fifty acres that previously made up all of plaintiffs' property, then all plaintiffs have established is a mere diminution in value, and although they still might be eligible to obtain compensation for the loss, they would fall outside the categorical entitlement to such compensation.[4] See *Lucas*, *supra* at 1019, n. 8, 112 S.Ct. at 2895.

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[2] In presuming the validity of this enactment, we recognize that a broad range of governmental purposes and regulations satisfy the requirement that the laws must advance a legitimate state interest. See *Bevan v. Brandon Twp*, 438 Mich. 385, 398, 475 N.W.2d 37, modified 439 Mich 1202 (1991). We also note that the validity of the Wetland Protection Act is presumed and that, on the basis of the record below, plaintiffs have not met their burden of overcoming this presumption. *Id.*

[3] The record demonstrates that plaintiffs had an investment-backed expectation in the property in question.

[4] Although the Supreme Court's opinion in *Lucas* settled some aspects of takings law, it expressly declined to answer the question before us today, i.e., which parcel should be used as a denominator in regulatory takings causes of actions. *Id.* 505 U.S. at 1016, n. 7, 112 S.Ct. at 2894, n. 7. Thus, we must look elsewhere for the answer to that question.

We have found two cases to be instructive in making this determination.

B

1

In *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (C.A.Fed.1994),[5] Loveladies originally owned 250 acres of land adjacent to wetlands. In 1972, after Loveladies developed approximately 199 acres, § 404 of the Clean Water Act, 33 U.S.C. § 1344, was enacted, and Loveladies was forced to obtain a permit to fill in the remaining land in accordance with their overall development plan. In the following years, New Jersey, the state in which the land was located, and Loveladies entered into negotiations to allow Loveladies to develop the remaining fifty-one acres. Ultimately, Loveladies agreed to essentially donate 38.5 acres to the state, in order to allow 12.5 acres to be filled and developed. The state accepted this plan.

Unfortunately for Loveladies, the permit process also required obtaining approval from the Army Corps of Engineers. Apparently the corps traditionally follows the state's recommendation, and, although New Jersey had previously granted the state permit, it recommended to the corps that it deny the federal permit. The corps followed New Jersey's recommendation. *Id.* at 1174.

Loveladies sued the United States, claiming that a compensable regulatory taking had occurred because it was denied all economically feasible use of the 12.5 acres of land. The United States disagreed, arguing that Loveladies merely suffered a diminution in its property's value, comparing the 12.5

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[5] The court's opinion in *Loveladies*, in concise yet complete detail, lays out the history of the law of regulatory takings and successfully puts into perspective the effects of *Lucas* on the development of the law in this area. The court in *Loveladies* then specifically addresses the issue presented here and brings that issue into sharp, clear focus.

acres with either the original 250 acres, or the fifty-one acres remaining after the 1972 amendment in the law. Thus, as here, one of the main issues before the court was how much of Loveladies' land to use as a comparison to the affected parcel to determine the extent of Loveladies' loss. Otherwise stated, the court in *Loveladies* was called on to determine the denominator parcel.[6] *Id.* at 1179.

The court of appeals began its discussion by eschewing any bright-line test to determine the denominator parcel and instead held that a flexible approach designed to account for factual nuances of each individual case should be used. *Loveladies*, *supra* at 1181.

The court then examined the factual nuances of the case before it and held that the 199 acres that had been developed before the enactment of § 404 of the Clean Water Act should not be considered as part of the denominator because no effort had been made by the state to regulate that land. *Id.* The court then determined that the 38.5 acres that had, in essence, been dedicated to the state should not be part of the denominator because it had no value to Loveladies. *Id.* Thus, the court was left with the 12.5 acres of land affected by the corp's permit denial. Because the court found the remaining value to be so small as to be useless, it concluded that Loveladies was denied all economically viable use of the property, thus entitling it to compensation under *Lucas*, *supra*.

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[6] The court in *Loveladies*, cited *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), in which the Court defined the "denominator parcel" in the following manner:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction. *Loveladies*, *supra* at 1180 n. 13.

Here, employing a similar analysis, we conclude that the denominator should not consist of the entire forty-five acres originally owned by plaintiffs because approximately half of that land already had been developed before the enactment of the Wetland Protection Act.

Examining the remaining 24.6 acres, we see no reason to exclude some eighteen acres of that land as part of the denominator in determining plaintiffs' loss. This case is in stark contrast with *Loveladies*, *supra*, to the extent the court in *Loveladies* determined that only the affected 12.5 acres in question had value to Loveladies. Here, the entire 24.6 acres is admittedly of high value to the plaintiffs. In other words, although plaintiffs lost the use of approximately six acres of the remaining 24.6-acre parcel, the land, when viewed as a whole, continues to have substantial value and may still be used in the manner intended by plaintiffs, i.e., it may be developed for commercial purposes.

Accordingly, the trial court properly concluded that plaintiffs' loss should be considered in light of the 24.6 acres, not merely the affected six acres.

C

Bevan v. Brandon Twp., 438 Mich. 385, 475 N.W.2d 37, modified 439 Mich 1202 (1991), also supports our conclusion here. In *Bevan*, the plaintiffs owned two parcels of lakefront property but were restricted by a zoning ordinance to being able to develop only one house on the two parcels. Although the plaintiffs argued that because of the restriction they were denied all economically feasible use of one of the parcels, our Supreme Court disagreed, holding that both of the parcels must be examined as a whole to determine the plaintiffs' loss. *Id.* at 396-397, 475 N.W.2d 37.

The Court relied on two United States Supreme Court opinions, *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978),[7] to support its ultimate conclusion that when determining whether a taking has occurred, the "plaintiffs' land, and the full bundle of property rights associated with it, must be viewed in its entirety," *Bevan*, *supra* 438 Mich. at 397, 475 N.W.2d 37.

D

Accordingly, on the basis of squarely applicable precedent of the Supreme Courts of both the United States and Michigan, we conclude that the trial court properly considered the panoply of plaintiffs' remaining property rights, rather than merely a portion of those rights, in determining the extent of the Wetland Protection Act's effect on plaintiffs' property. In other words, the court correctly used the 24.6-acre parcel as the denominator in determining the extent of plaintiffs' loss.

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[7] With regard to *Penn Central*, the United States Supreme Court in *Lucas*, *supra*, suggested that New York's determination that all of Penn Central's holdings in the area could be used as the denominator was unsupportable. The Court in *Penn Central*, however, did not rely on that determination. Instead, the Court focused on the property in question and the alleged total loss of airspace rights when it stated:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. [438 U.S. at 130.]

Thus, while it may be argued that the extent of New York's decision in *Penn Central* was unsupportable, it cannot be gainsaid that the Supreme Court approved the concept of viewing an affected property as a whole. We conclude it would be contrary to the holding in *Penn Central* to extract portions of a property and examine those portions piecemeal when determining the effect of a land-use regulation on the property.

E

We also conclude that the trial court did not err in determining that plaintiffs were not entitled to compensation for the diminution in the value of their property. See *Lucas*, *supra* 505 U.S. at 1019, 112 S.Ct. at 2895, n. 8. Plaintiffs have failed to show that their property either is unsuitable for use because of the Wetland Protection Act or is now unmarketable. *Bevan*, *supra* 438 Mich. at 403, 475 N.W.2d 37. Indeed, as plaintiffs acknowledge, their land, even as regulated, is still worth more than $600,000, and the majority of it may still be developed for commercial purposes. Accordingly, we find no error in this aspect of the trial court's conclusion.

III

In sum, we conclude that the trial court properly determined the extent of plaintiffs' loss by considering how the land-use regulation in question affected plaintiffs' rights to their property as a whole, rather than by examining the effect of the regulation on only the affected six acres. Employing this analysis, we also agree with the trial court that the mere diminution in the value of plaintiff's property is not compensable.

Affirmed.

/s/ Janet T. Neff
/s/ Jane E. Markey

SAWYER, J (dissenting).

I respectfully dissent.

The majority correctly looks to the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), for guidance. However, the majority fails to appreciate the ramifications of the *Lucas* decision.

In *Lucas*, the Supreme Court reiterated the rule that where regulation denies all economically beneficial or productive use of land, a taking occurs and the owner is entitled to compensation. *Id.* at 1015, 112 S.Ct. at 2893. The *Lucas* Court found a taking where a state statute prohibited building on the plaintiff's beach-front property. The instant dispute involves the question raised, but not directly answered, in *Lucas*, namely, whether all the economic use of all of plaintiffs' property must be deprived by the regulation before there is a taking or whether it is sufficient that a portion of plaintiffs' parcel is denied all of its beneficial use because of the taking.[1] The Court commented on this question in *Lucas*, *id.* at 1016, n. 7, 112 S.Ct. at 2894, n.7:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme--and, we think, unsupportable--view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 NY2d 324, 333-334; 366 NE2d 1271, 1276-1277 (1977), aff'd 438 US 104 [98 S.Ct. 2646, 57 L.Ed.2d

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[1] This appears to be the basis of the dispute between the parties concerning whether the remaining 24.6-acre parcel should be considered or whether the original fifty-acre parcel should be considered in analyzing whether there was a taking. However, it is not relevant which of those two parcels is viewed. Rather, the focus is on the 4.6-acre parcel that forms the subject of the regulation.

> 631] (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

While the Supreme Court was able to avoid the question in *Lucas* because it was undisputed that *Lucas* was denied the beneficial use of all of his property by the regulatory taking, that question cannot be avoided in the case at bar. If either the remaining 24.6-acre parcel or the original fifty-acre parcel is viewed as a whole, then it is clear that plaintiffs have not been denied all economic use of their property because the property is usable with the exception of approximately 4.3 to 6 acres of wetlands and surrounding area. On the other hand, if we focus on the wetland parcel itself, plaintiffs are denied the economic use of that property inasmuch as the denial of the fill permit precludes them from developing and making use of that parcel.

In reaching its decision, the majority finds support in *Bevan v. Brandon Twp*, 438 Mich. 385, 475 N.W.2d 37 (1991). In *Bevan*, our Supreme Court concluded that there was no taking where a zoning ordinance had the effect of allowing the property owner to build only one house on two contiguous lots.[2] Our Supreme Court concluded that in determining whether a taking existed, the property must be viewed as a whole. *Id.* at 397, 475 N.W.2d 37. However, I do not believe that *Bevan* is controlling for two reasons.

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[2] The reason for the restriction was that the property was accessible only by an easement that was twenty feet wide while a zoning ordinance required a road with a right of way of sixty-six feet in width if it was servicing two or more houses.

First, the Michigan Supreme Court's decision in *Bevan* was rendered before the United States Supreme Court's decision in *Lucas*. Accordingly, there is a question whether *Bevan* remains good law. The viability of the decision in *Bevan*, moreover, is additionally questionable because of *Bevan's* strong reliance on the United States Supreme Court's decision in *Penn Central*, *supra*. Indeed, the Michigan Supreme Court directly cites *Penn Central* in support of the proposition that the property must be viewed as a whole. However, when the United States Supreme Court decided *Lucas* the following year, it disavowed that view expressed in *Penn Central*, declaring that view to be "extreme" and "unsupportable." 505 U.S. 1016, n. 7, 112 S.Ct. at 2894, n. 7.

Moreover, even if we were to defer to the Supreme Court to address the question of the continuing viability of *Bevan* in light of *Lucas*, I do not believe that *Bevan* is relevant to the disposition of the case at bar. In *Bevan*, the property owner was not denied the beneficial use of all of his property, or even a portion of his property. Rather, he merely was restricted with respect to the extent to which he could use and develop the property. That is, unlike the case at bar, the property owner in *Bevan* could build a single-family detached house, the intended use of the lots, anywhere he wanted on either of the lots involved. He merely was precluded from building two houses, one on each lot, as he had intended. Therefore, the property owner was able to use all of his property, though not in the manner he desired. In the case at bar, however, the property owner enjoys no such freedom. The effect of the Wetland Protection Act, M.C.L. § 281.701 *et seq.*; M.S.A. § 18.595(51) *et seq.*, and of defendant's denial of a fill permit is to preclude utterly the use of a portion of plaintiffs' property. Plaintiffs are not free to choose what portion of their property to develop. Rather, the regulation allows development of a specific portion of the property and absolutely precludes the development of another portion of the property.

The majority's strong reliance on *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (C.A.Fed.1994), is somewhat mystifying inasmuch as that court ruled in favor of the property owner. Ultimately, like *Lucas*, it avoided a clear determination on partial takings, concluding that a full taking had occurred. *Loveladies*, *supra* at 1182.

In sum, where there is a mere restriction on the extent of use of property, as was the case in *Bevan*, there is no taking. However, where a property owner is prohibited from making use of his property, or even a portion of the property, then there is a taking with respect to the identifiable portion which cannot be used. In short, in light of the strong historical protection of private property in this country and the constitutional mandate that the government may put private property to public use only after compensating the owner of that property, I believe that the question posed in *Lucas* is best answered by concluding that a taking occurs where a regulation precludes the use of an identifiable, discreet piece of property, even if that property forms only a portion of a larger parcel. I do not find it relevant how large a portion of property the owner possesses. What is relevant is that the government has determined that a public purpose would be served by denying the rightful owner of the property the use of that property and requiring it to be used, or in this case not used, in accordance with that public purpose. While the government is permitted to do this, it must compensate the property owner for putting the property to public use. Our historical protection of private property in the constitution allows no less.[3]

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[3] It should be noted that the conclusion that there is a taking does not necessarily compel the conclusion that there must always be compensation. Compensation is, of course, required for the value taken. If the property is utterly worthless, then there is no value taken and no need for compensation. Similarly, if the cost of filling the property and rehabilitating it to the point that it can be developed

(continued...)

For the above reasons, I would conclude that the trial court erred in determining that there was no taking. Rather, the trial court should have determined that a taking occurred by the denial of the fill permit under the Wetland Protection Act and should have proceeded to determine the amount, if any, of compensation due plaintiffs.

/s/ David H. Sawyer

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[3] (...continued)
would exceed the value of the property once it is rehabilitated, then nothing of value is taken. However, we are not called upon in this appeal to address the issue of the amount of compensation, rather only whether there was a taking. I would conclude that there was a taking, but leave it for the trial court to determine the amount, if any, of compensation that is due.

Filed 12/23/92

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

RUSSELL H. VOLKEMA and
LOIS J. VOLKEMA, husband
and wife,

Plaintiffs,

v

File No. 91-13914-CM
HONORABLE
WILLIAM E. COLLETTE

STATE OF MICHIGAN; THE DEPARTMENT OF NATURAL RESOURCES, and ROLAND HARMES, Director of the Department of Natural Resources,

Defendants.

JUDGMENT

At a session of court, held in Lansing,
Michigan on December 23, 1992.

This action was commenced with the filing of a Complaint on October 29, 1991. In an Opinion and Order dated June 18, 1992, the court denied plaintiffs' Motion for Summary Judgment or Alternative Partial Summary Disposition. In an Opinion and Order dated September 29, 1992, the court denied plaintiffs' Second Motion for Summary Judgment or Partial Summary Disposition, denied defendants' Motion for Summary Disposition as to Count I and granted Defendants' Motion for Summary Disposition as to Count II. Trial was held on November 9, 1992. In an Opinion and Order dated December 10, 1992, the court determined that defendants' denial of a permit pursuant to the Goemaere-Anderson Wetland

Protection Act did not constitute an unconstitutional taking of plaintiffs' property.

WHEREFORE, for reasons set forth in this court's Opinion and Orders dated June 18, September 29, and November 9, 1992,

IT IS ORDERED, judgement of no cause of action is entered in defendants' favor.

/s/ William E. Collette
William E. Collette
Circuit Judge

Approved for entry
pursuant to MRC 2.602(B)(2)

/s/ Russell H. Volkema
Russell H. Volkema
Attorney for Plaintiffs

/s/ Kevin T. Smith
Kevin T. Smith
Assistant Attorney General
Attorney for Defendants

Appendix D-1

Filed 12/10/92

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

RUSSELL H. VOLKEMA and
LOIS J. VOLKEMA, husband
and wife,

Plaintiffs,

v.

File No. 91-13914-CM

Hon. William E. Collette

OPINION AND ORDER

STATE OF MICHIGAN, THE
DEPARTMENT OF NATURAL
RESOURCES, and ROLAND
HARMES, Director of Department
of Natural Resources,

Defendants.

FACTS

Russell H. Volkema and Louise T. Volkema are the owners of a 24.6 acre parcel of property located in the City of Kentwood, Kent County, Michigan. This parcel is zoned commercial and runs along 28th Street, a prime commercial development area.

A 4.6 acre piece of the property has been determined to be a protected wetland under the Goemaere-Anderson Wetland Protection Act. MCLA Section 281.701, *et seq*. In order to "square off" the boundaries of the protected property, another 1.4 acres of Plaintiffs' property is also unusable.

This Court has previously addressed several issues in this lawsuit in two opinions on file. Those two opinions are incorporated herein.

OPINION

In view of this Court's previous rulings, the only issue remaining to be determined is whether the application of the Wetland Protection Act to Plaintiff's property has destroyed the economic value of Plaintiffs' property or interfered unreasonably with Plaintiffs' investment-backed expectations. *Loveladies Harbor, Inc. v. US*, 31 ERC 1848 (1990).

During the trial, it was shown that the 4.6 acre wetland is confined to one side of the property. Commercial development has occurred in a portion of the balance of the property by the construction of a parking lot and such development is planned and feasible for the balance of the non-wetland areas of the parcel. The testimony demonstrated that the non-wetlands have a commercial value of $35,000 to $40,000 per acre. Plaintiffs have argued that the wetlands have a negative impact on the other property because of the taxes paid on them, because mosquitos breed there, and because they are unsightly. This Court notes that property taxes on lands determined to be wetlands are to be reduced accordingly to reflect the obvious impact on value. Further, mosquitos breed all over the state of Michigan and wetlands, while unsightly to some, have an intrinsic beauty in the eyes of other beholders. In this Court's opinion, where the balance of this parcel has a value in excess of $600,000, it cannot be said that the economic impact is such as to constitute a taking.

During argument in this case, Plaintiffs continued to rely on the theory that, since they are prohibited from any commercial development of the six-acre area, a taking has occurred. They contend this Court must ignore the value of the balance of

the property. In support of this view, Plaintiffs have cited *Lucas v. South Carolina Coastal Council*, 112 S Ct 2886 (1992).

However, *Lucas* is distinguishable on its facts. There the regulation prohibited *any* use or development of the entire parcel of property owned by the plaintiff. Here, only a quarter of the total parcel is restricted and the balance has a value in excess of $600,000. As this Court has noted before, zoning regulations often require set backs from property lines and other requirements that limit or prohibit the ability of an owner to develop part of their property. These do not constitute a taking since it is recognized that such rules are for the good of all. Only where the regulation amounts to a confiscation or a total denial of use does it constitute a taking. In this case, most of the economic value of the 24.6 acre parcel remains. This Court finds for the Defendants.

Defendants shall prepare and file an appropriate order.

Dated 12/10/92

/s/ William E. Collette
William E. Collette, Circuit Judge

Appendix E-1

Filed 9/29/92

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

RUSSELL H. VOLKEMA and
LOIS J. VOLKEMA, husband
and wife,

Plaintiffs,

v

STATE OF MICHIGAN, THE
DEPARTMENT OF NATURAL
RESOURCES, and ROLAND
HARMES, Director of Department
of Natural Resources,

Defendants.

File No. 91-13914-CM
Hon. William E. Collette
OPINION AND ORDER

This matter is before the Court on Plaintiffs' Second Motion for Summary Judgment, or Partial Summary Disposition and Defendants' Motion for Summary Disposition, both based on MCR 2.116(C)(10). This Court, having read the motions, responses, briefs, and related filings, having heard oral argument of the parties, and being fully advised in the premises, makes the following determinations:

FACTS

The Court incorporates herein the facts set forth in its Opinion and Order dated June 18, 1992.

In its June 18, 1992, Opinion and Order, the Court held that for purposes of the taking analysis, the whole of the parcel is determined to be 24.6 acres. Subsequently, the parties filed cross-motions for summary disposition.

Even though the Court has previously determined that for purposes of a taking analysis the whole of the parcel is determined to be 24.6 acres, Plaintiffs' motion argues once again that the Defendants' actions have affected a taking of the six acres. Plaintiffs further argue that the six acres of wetland carries with it a heavy property tax burden which gives the entire 24.6 acre parcel a negative value. As evidence of its negative value, Plaintiffs attach tax bills and the Affidavit of Carl Fink, President of a general partner of a limited partnership, which owns the water park adjacent to the 24.6 acres of Plaintiffs' property. The Affidavit states that the partnership has an interest in purchasing the 24.6 acreage except for the wetland acreage, and further states that the property tax on the wetland acreage creates a negative value on the entire 24.6 acres.

Defendant argues that Plaintiffs have not lost any compensable property right as a result of the denial, that there is no taking because regulation of the wetland is a valid exercise of the state's police power, and that the permit denial does not involve an actual invasion of Plaintiffs' property, does not deny Plaintiffs all economically beneficial or productive use of their property, and does not go so far in restricting Plaintiffs' use as to constitute a taking. Defendant further argues that the Uniform Condemnation Procedures Act is not applicable to inverse condemnation or takings claims.

DISCUSSION

Plaintiffs continue to argue that this Court should only consider the six acres for purposes of the taking analysis. Plaintiffs argue that the Court should follow *Loveladies Harbor, Inc. v. US*, 15 Cl Ct 381 (1988). This issue was previously decided in the Court's Opinion and Order dated June 18, 1992, wherein the Court determined that 24.6 acres was the proper consideration for the taking analysis. This Court notes that in *Loveladies Harbor, Inc., supra*, the reason the court defined the whole parcel as 12.5 acres and not 51 acres is because some of that property was not contiguous, and because the possibility of

obtaining a permit for the remaining property was an impossibility. Therefore, it also was almost certainly as equally valueless as the 12.5 acres, making any inquiry into the regulations' economic impact and its interference with reasonable investment backed expectations on the 51 acres, a fruitless endeavor.

Having laid that issue to rest, the Court can address the core issue in these motions: Whether there is a genuine issue of material fact as to whether or not there has been a taking. This court determines that there remain genuine issues of material fact to be determined at trial.

As noted in this Court's earlier opinion, the Supreme Court has characterized the taking analysis as one where ad hoc, factual inquires into the circumstances of each case must be made. *Penn Central Transportation Co v. New York*, 438 US 104, 130-131; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

The Court agrees with Plaintiffs that *Loveladies Harbor, Inc. v. US*, 31 ERC 1848 (1990) set forth the applicable law. The Court in *Loveladies* recognized that Courts look to several issues in determining whether a taking has occurred.

> First, a taking can occur where the imposition of a government regulation fails to substantially advance a legitimate governmental interest . . . Second, a taking can occur where the imposition of a governmental regulation has the effect of depriving the owner's land of all economic value. (citations omitted).

Loveladies Harbor, Inc. v. US, 15 Cl Ct 381 (1988). The first issue is not challenged in this case. In order to analyze the second issue, whether a government regulation has deprived an owner of the economic value of his land, three factors have been utilized:

1) the character of the governmental action;

2) the economic impact of the regulation on the claimant;

and

3) the extent to which the regulation has interfered with reasonable investment-backed expectations.

Loveladies, *supra*, at 391, citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 US 470, 495; 107 S Ct 1232, 1247; 94 L Ed 2d 472 (1987).

In the first factor, the court must determine whether the act closely parallels an act of eminent domain. The central inquiry is "whether the act is equivalent to the physical invasion or destruction of substantial rights held in the property." *Loveladies Harbor, Inc.*, *supra*. As in *Loveladies*, the Plaintiffs have not been directly hindered in their rights to possess, dispose, and exclude others. Therefore, as in *Loveladies*, this Court finds that this case is not the equivalent of any destruction or intrusion attendant with an act of eminent domain.

In order to properly evaluate the second and third factors, the court must compare the value of property before and after the regulation's interference. This involves comparing the differing fair market values of the property. *Loveladies*, *supra* at 391.

The only evidence provided by Plaintiff of the fair market value of the property after the regulation is Mr. Fink's Affidavit. The Affidavit, however, states that the general partners of Water Park of Michigan Limited Partnership wish to purchase the property and that the wetland area has a negative value effect on the total parcel. This is not sufficient evidence of fair market value. Defendants provide absolutely no evidence of fair market value. As such, this Court is unable to properly determine the economic impact of the regulation, if any, and its interference with reasonable investment-backed expectations, if any. Therefore, based upon the foregoing, Plaintiffs' Motion for

Summary Disposition is denied, and Defendants' Motion for Summary Disposition, as it applies to these issues, is also denied.

Defendants also argue that Plaintiffs should not be compensated because the regulation prevents a harmful use and that Plaintiffs should not be compensated because there is a valid application of the State's police power. The Supreme Court rejected these arguments in *Pennsylvania Coal Co. v. Mahon*, 260 US 393; 43 S Ct 158; 67 L Ed 2d 322 (1922), and more recently in *Lucas v. South Carolina Coastal Council*, __ US __; 112 S Ct 2886; __ L Ed 2d __ (1992). Therefore, Defendants' Motion for Summary Disposition on these issues is denied.

Finally, Defendants argue that the Uniform Condemnation Act, MCL 213.50, has no application to inverse condemnation actions, and therefore Count II of Plaintiffs' Complaint should be dismissed. The Court agrees. The law is well settled that the Act is not applicable to inverse condemnation proceedings. *Jack Loeks Theatres, Inc. v. City of Kentwood*, 189 Mich App 603, 616 (1992) lv den. 439 Mich 962 (1992).

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Disposition is DENIED, and Defendants' Motion for Summary Disposition is DENIED as to Count I and GRANTED as to Count II.

Dated: Sept 29, 1992

/s/ William E. Collette
William E. Collette
Circuit Judge